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IN THE

Supreme Court of the United States

October Term 1942

LESLIE FULLARD-LEO AND
ELLEN FULLARD-LEO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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To the Honorable
The Supreme Court of the United States:

Petitioners above named pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the case numbered and entitled in its docket as "No. 9889, United States of America, Appellant, v. Leslie Fullard-Leo, et al, Appellees," on February 1, 1943 (R. 377)* which reversed the judgment of the District Court of the United States for the Territory of Hawaii entered on December 27, 1940 (R. 51).

* We are unable to give the page of the record because we have not received a copy of the record from the Court of Appeals.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case involves the title to the Island of Palmyra which is situated in the Pacific Ocean about 900 miles south of Honolulu, Hawaii. Title and possession of this island have been undisputed for 78 years, and unchallenged until this suit was brought in December 1939. The facts surrounding the title are rooted in the history of Hawaii. The action of the Circuit Court of Appeals has overturned a title recognized since 1862 by the Hawaiian monarchy and its successor governments, including the Territory of Hawaii—a title registered under the Torrens Title system by the Land Court of the Territory in 1912.

The Island of Palmyra was discovered by Captain Sawle of the American vessel Palmyra on November 6, 1802 (R. 195). It does not appear that Captain Sawle landed on the island. The United States government did not assert sovereignty over it. The island was annexed by the government of Hawaii in 1862 and made part of the Kingdom of Hawaii.

In the late 50's of the last century, Zenas Bent and Johnson Wilkinson, both Hawaiian subjects, occupied the island and made some improvements there (R. 199).

Prior to February 26, 1862, Bent and Wilkinson petitioned the Hawaiian government that the Island of Palmyra be considered a Hawaiian possession and placed under the Hawaiian flag. At a meeting of the cabinet council held on that date the King directed his minister of the interior to grant what the petitioners applied for (R. 63, 64).

On March 1, 1862, a commission was issued to Bent authorizing him to take possession of the island, and gave directions as to how to proceed (R. 71).

The purpose of the proposed annexation of the island was stated to be increasing the trade and commerce of the kingdom as well as offering protection to the interests of its subjects (R. 69). Bent later reported that he had executed his instructions and had left his workmen on the island (R. 74).

On June 18, 1862, an official proclamation was made by the minister of the interior, reciting that on April 15, 1862, Palmyra Island was taken possession of by Captain Zenas Bent in the name of Kamehameha IV, King of the Hawaiian Islands, and giving notice that henceforth said island should be considered and respected as part of the domain of the King of the Hawaiian Islands (R. 83).

Thereafter, Bent conveyed his interest to Wilkinson (R. 122), Wilkinson devised the island to his wife (R. 127), and by mesne conveyances the title became vested in Henry E. Cooper who, in 1912, registered it in the Land Court of Hawaii and received a certificate of fee simple ownership (R. 4, 148). Cooper conveyed the island (except two islets) to these petitioners in 1922 (R. 5, 251).

Neither the government of Hawaii during the monarchy (1862-1893), the provisional government (1893-1894), nor the Republic of Hawaii (1894-1898) at any time asserted possession or ownership of the island (R. 180), but in at least three years (1885-1887) the government of the monarchy assessed it for taxation as private property (R. 212-215). Nor was there any evidence that Bent and Wilkinson or any of their successors in title ever

paid any rent or royalty for the use of the island or otherwise attorned to the government (R. 209-211).

In 1912, the Governor of Hawaii reported to the Secretary of the Interior that "the private title to this island has been from a date several years before 1862 to the present time in citizens of Hawaii and one Hawaiian corporation," and that "the title to the island both as to sovereignty and as to private ownership would seem to be American without question" (R. 195).

That letter of Governor Frear was accepted as authoritative by the federal government, and the sovereignty of Hawaii by reason of the annexation of the island in 1862, and the sovereignty of the United States since 1898, based on the representations made in the letter, have been affirmed by the department of state.

> *Hackworth's* Digest of International Law (an official publication), Vol. 1, pp. 487-491.

Immediately before the commencement of this action to quiet the title to the island, the United States government had been negotiating with the Fullard-Leos for a lease of the island (R. 221-236, 278-281).

The basic facts were undisputed. The controversy is as to the application of the law to those facts.

The trial court held that the United States had failed to prove its alleged claim of title (R. 50), and entered judgment accordingly. That judgment has been reversed by the Court of Appeals.

OPINIONS BELOW

Opinion of the trial court (unreported), dated December 23, 1940, entitled "Findings of Fact and Conclusions of Law," (R. 28-50).

Opinion of the Circuit Court of Appeals, dated February 1, 1943 (R348).

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1943, and the mandate has been stayed pending the filing and disposition by this Court of this petition (R378).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U.S.C.A., Title 28, Section 347).

QUESTION PRESENTED

Did the plaintiff prove its alleged claim of title that Palmyra Island was annexed and became a part of the public or crown lands of the Kingdom of Hawaii on June 18, 1862, and that by virtue of the joint resolution of Congress, approved July 7, 1898, the absolute fee and ownership thereof vested in the United States of America?

REASONS FOR ALLOWANCE OF WRIT

This cause, we believe, is *sui generis*. Apparently, it is without judicial precedent, and presents a question which, we are convinced, ought to receive the consideration of this Court.

The initial and novel query is whether, when national sovereignty is extended to an island theretofore belonging to no nation, but which is peaceably occupied by subjects

of the annexing nation, does the island become public property, or has the sovereignty been extended to it subject to and in recognition of the prior occupants' right of possession?

In the majority opinion below (R. 359), authority was cited to the effect that where uninhabited territory is acquired by *discovery* by persons acting under governmental authority the land becomes public property of the discoverer's nation, and applied, or misapplied, it to a case where the title did not rest upon discovery but where an island, which was in the possession of persons acting solely in their own right and initiative, was subsequently annexed by the nation whose subjects they were.

Again, if none of the successive governments of the Hawaiian Islands ever asserted claim to Palmyra as public land but evidently regarded it as private property from 1862, when the island was annexed, to 1898, when the Hawaiian group was ceded to the United States, is it right or proper for the courts of the United States to now hold that during all those years Palmyra was public land, title to which passed to the United States under the terms of the joint resolution of Congress, approved July 7, 1898 (30 Stat. 750)?

Again, does not the fact that the United States government, though well aware of the claim of private ownership, remained inactive for over forty years, show that it had acquiesced in and affirmed the position taken by the governments of Hawaii when that country was an independent nation?

A review of this cause by this Court would result in an authoritative determination of unprecedented questions

and do justice where it is obvious, we believe, that sound principles have been ignored and injustice has been done.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that court to certify and to send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled in its docket as "No. 9889, United States of America, Appellant, v. Leslie Fullard-Leo, et al, Appellees," and that the judgment of said court be reversed, and the judgment of the District Court of the United States for the Territory of Hawaii be affirmed, and for such further relief as to this Court may seem proper.

DATED, Honolulu, Hawaii, March 18, 1943.

A. G. M. ROBERTSON,
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ROBERTSON & CASTLE,
Of Counsel.

No. .....

IN THE

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LESLIE FULLARD-LEO AND
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UNITED STATES OF AMERICA,
Respondent.

Brief in Support of Petition for Writ of Certiorari

The petition contains a statement of the case and of the grounds of jurisdiction, and references to the opinions of the courts below.

ERRORS TO BE URGED

The Circuit Court of Appeals erred in:

1. Holding that under the principles of international law, the taking of possession of the Island of Palmyra by Zenas Bent perfected the title of the King.

2. Holding that the contract between the Hawaiian government and E. P. Adams, dated May 31, 1858, formed part of the resolution regarding the Island Cornwallis.

3. Holding that the evidence did not warrant a finding that title had passed from the Hawaiian government by a lost grant.

4. Not holding that the judgment of the Land Court of Hawaii established fee simple title to the island in Henry E. Cooper, petitioners' grantor.

I.

THE COURT ERRED IN HOLDING THAT UNDER THE PRINCIPLES OF INTERNATIONAL LAW, THE TAKING OF POSSESSION OF THE ISLAND BY BENT PERFECTED THE TITLE OF THE KING.

Zenas Bent and Johnson Wilkinson occupied the Island of Palmyra for some years prior to 1862 when the island had no national sovereignty; they requested the Hawaiian government that the island "be considered a Hawaiian possession and be placed under the Hawaiian flag," and on February 26, 1862, their request was granted (R. 64).

On March 1, 1862, a commission was issued to Bent authorizing him to take possession of the island in the name of the King (R. 71). Accompanying the commission was a letter which stated the purpose of the annexation to be "increasing the trade and commerce of this Kingdom as well as offering protection to the interests of its subjects" (R. 69).

Bent executed his commission and reported to the minister of the interior on June 16, 1862 (R. 74), and on June 18 an official proclamation was made of the annexation of the island which would "henceforth be considered and respected as part of the domain of the King of the Hawaiian Islands" (R. 83).

That evidence was introduced by the plaintiff in the trial court in the endeavor to support the allegation con-

tained in paragraph I of the petition, as amended (R. 8), that Palmyra was annexed and became a part of the public or crown lands of the Kingdom of Hawaii on June 18, 1862.

The question was whether the island, upon its annexation, became public property of the Hawaiian government, or whether the extension of Hawaiian sovereignty over the island was in recognition of the possessory right of Bent & Wilkinson acquired by their prior occupancy of the island.

The majority of the court below held that "The commission makes it abundantly clear that Bent was merely acting as agent of the King. Under the principles of international law, the taking of possession by Bent perfected the title of the King. Nothing in the resolution or the letter referred to is contrary to that view."

In support of that view the court cited *Johnson v. McIntosh,* 8 Wheat. 543, and *Martin v. Waddell,* 16 Peters, 367, 409. Neither of those cases, however, dealt with a situation comparable with this case. In those cases the court dealt with the title to land which rested upon the right of discovery by persons acting under the authority of the British Crown.

Palmyra Island was discovered by an American in 1802, but no national sovereignty was extended to the island until by the government of Hawaii in 1862, and in the meantime it had been occupied by two Hawaiian subjects. The title to Palmyra as presented to the court does not involve title by discovery of unoccupied territory, but involves the title of occupied land by annexation. Different considerations must be applied.

A nation may acquire new territory either by discovery, cession, conquest, or by simple annexation.

Title by discovery implies that there is no one in possession, or at least no one who is recognized as having any title, such as the American Indians. *Patton* on Titles, Sec. 151.

Title by cession and by conquest imply that someone was in possession.

Title by annexation, through *ex parte* action, as in the case of Palmyra Island, implies that no other nation claimed sovereignty, but it is evident that there may have been individuals in possession, and there is no reason why they should not have been subjects of the annexing nation. In any event the annexing power could well recognize the rights of the occupants if it should see fit to do so. We contend that that was done with respect to Palmyra.

When sovereignty is extended by annexation it is analogous to extension through cession or conquest, in which cases the rights of the occupants are respected.

It is a well established principle of international law that the inhabitants of a country are protected in their property rights notwithstanding a transfer of sovereignty. 50 C. J. 1206. That principle has been applied in many cases by this Court with reference to land titles in territory formerly under the sovereignty of Spain, France and Mexico. It can appropriately be applied to a case like the present, and, we believe, was applied to Palmyra. The Hawaiian government was justified in doing so. This Court will not sit in judgment of what that government did. *Underhill v. Hernandez,* 168 U. S. 250, 252.

Bent & Wilkinson, when they took possession of the island, could not have acquired title from any government, for the reason that at that time no government had any title to convey. And if, as we contend, the sovereignty of Hawaii was extended there in recognition of and agreeably to their prior possessory right, there was no reason why they should have sought to obtain title from the Hawaiian government.

Bent & Wilkinson took possession when no country and no other individual claimed title. The island became theirs. They could not get paper title because no one had any title to convey to them. Nevertheless, their title by occupancy was good—it was the best that could be had. It remained only for the Hawaiian government to recognize it and to give the occupants the protection of law which they sought. The interests of the Hawaiian subjects which were to be protected by the annexation of the island (R. 69) were those of none other than Bent and Wilkinson.

Blackstone says that occupancy is the taking of things which before belonged to nobody, and that according to the law of nations that which belonged to no one is by natural reason granted to the occupant. 2 Bl. Com. 258. In a note to *Jones' Blackstone,* p. 1051, it is stated that "It is true that occupancy as a source of title in natural law assumes that the property has no individual owner, and that the occupant therefore, acquires a title which is valid from the moment of taking possession * * *"

Peaceable possession of land is *prima facie* evidence of ownership. In an action to quiet title to land the burden of proof is upon the plaintiff, and he cannot recover unless he proves a better title than the occupant has.

Upon the annexation of the island by the Hawaiian government Bent & Wilkinson received the protection of Hawaiian law, and their right of possession evolved into a title legally protected and enforceable. That title is now vested in these petitioners.

The Hawaiian government had the right to determine what its attitude and policy would be with reference to the annexation of Palmyra. In 1862 Hawaii was an independent nation (in form a monarchy) which had been recognized as such by the world powers since 1844, and it acted through the King as titular head of the government according to its own concept as to what was proper. It, like its successors, exercised "all the powers and prerogatives of complete sovereignty." *Hawaii v. Manikichi*, 190 U. S. 197, 216.

This case should not be decided according to what present-day courts may think the Hawaiian government could or should have done, but in view of what that government did or did not do.

> "In all ancient instruments and transactions, where doubtful words are used, where the purpose and intent are obscurely expressed, the acts and conduct of the parties, immediately following, are to be regarded as the best expositors."
>
> *Cambridge v. Lexington*, 17 Pick. 222, 230.

The entire record is consistent with an intent and understanding on the part of the Hawaiian government that the annexation of Palmyra extended Hawaiian sovereignty there without disturbing the possessory title of Bent & Wilkinson, and is irreconcilable with the notion that by

reason of the annexation the island necessarily became public land of the government.

In this connection we call the Court's attention particularly to the following circumstances:

(a) The proposal to annex the island did not emanate with the government. It was initiated by Bent & Wilkinson who must have had in mind some purpose of their own. Other evidence showed that they had been interested in the island for some years prior to that. What their enterprise was does not appear; whatever it was, they evidently had found the need of the protection of some sovereignty and of the law which would go with it. The applicants being Hawaiian subjects, naturally looked to the Hawaiian government. Obviously they were moving in their own interests, and not in the interests of the Hawaiian public. It was not their ambition that Palmyra be acquired by the government as public land. They wanted Hawaiian sovereignty extended there. Hence, their petition was that the island be placed under the Hawaiian flag and be considered a Hawaiian possession. Their petition was granted.

(b) The proclamation of annexation did not imply that the island had become public land. That constituted notice to the world, and especially to the foreign diplomatic representatives in Hawaii, that Hawaiian sovereignty had been extended to the island. It was of international concern and affected nations who were interested in acquiring islands in the Pacific; but was not intended to determine the status of Palmyra as public or private land which would be a mere matter of domestic concern not requiring a public proclamation.

(c) A careful search of the public archives of Hawaii (R. 210) and of the records in the office of the commissioner of public lands (R. 180) disclosed no evidence that the Hawaiian government ever claimed Palmyra as public land. The trial court so found the fact (R. 48).

In this connection the majority opinion below quoted from a report of the attorney general of the Territory made in 1905 (R. 297) which the dissenting opinion pointed out wholly distorted its meaning. The attorney general had been asked for an opinion as to the jurisdiction of the Territory of Hawaii "over the various small guano islands to the northwest of Kauai." Palmyra, being about a thousand miles southeasterly from Kauai, and not a guano island, was not within the scope of the inquiry. The attorney general had no occasion to investigate the private title to Palmyra although it was a matter of public record, and merely remarked that it seems to have been acquired during the reign of Kamehameha IV. The other islands lying to the northwest are guano islands, some of which had been commercially exploited by lessees who dealt in guano, whose rights had never been disputed, and this the attorney general regarded as evidence of the validity of the Hawaiian claim. There had been no lease of Palmyra so that that island was not within the attorney general's conclusion. It threw no light at all on the title to Palmyra.

(d) The Hawaiian government not only made no claim to Palmyra as public land, but in at least three years (1885-1887) assessed it for taxes as private property (R. 212-215).

In this connection the majority opinion below said that after 1887 "no taxes were levied against the island until 1911." That statement was incorrect and unfair. As pointed out in the dissenting opinion the evidence showed that many of the old tax records had been lost or are missing (R. 312) so that it cannot be ascertained whether the taxes were assessed and paid in other years. That is the not unnatural result of the assertion of the stale claim set up by the government. It is not the fault of these petitioners.

(e) The report of the commission appointed pursuant to the joint resolution of Congress was transmitted by the President to the Senate on December 6, 1898 (U. S. Senate Document 16, 55th Congress, 3rd Session). The trial court was asked to take judicial notice of it (R. 46).

The report contained what purported to be a complete inventory of the property, real and personal, belonging to the Republic of Hawaii, which was delivered over to the government of the United States pursuant to the terms of the annexation of Hawaii.

On page 4 of that report appears a list of the islands which comprised the Hawaiian group, in which Palmyra is included.

Beginning on page 47, and extending to page 64, is a statement showing the names, areas and locality of the public lands, title to which passed to the United States. Palmyra Island is not mentioned.

This would seem to be practically conclusive on the point that Palmyra was not a public land of the Republic of Hawaii.

The majority opinion below quoted a paragraph which appears on page 4 of the report, as follows:

> "The statistics available in regard to the public lands belonging to the Republic of Hawaii at the time of the cession to the United States are not of that absolute or definite character that they can be accepted as conclusive of areas and values."

In this case, however, neither the area nor the value of Palmyra is at all important. We are concerned only with the identity of the island, and there is no question as to that. The paragraph quoted is of no consequence here.

(f) On January 10, 1912, Walter F. Frear, Governor of Hawaii, wrote to the Secretary of the Interior saying, among other things concerning Palmyra,

> "The private title to this island has been from a date several years before 1862 to the present time in citizens of Hawaii and one Hawaiian corporation, successively, the records of the successive transfers being in the record and probate offices in this city. The present owner is Hon. H. E. Cooper, a circuit judge of the first circuit of this Territory and formerly Secretary of the Territory. Thus the title to the island both as to sovereignty and as to private ownership would seem to be American without question" (R. 195).

Enclosed with that letter was a copy of a letter addressed to Governor Frear by Henry E. Cooper, which contained the statement that "Capt. Zenas Bent and J. Wilkinson settled on the island sometime in the late 50's and made considerable improvements thereon" (R. 199).

Both of those letters were received in evidence without objection, the latter upon the insistence of counsel for the plaintiff (R. 189, 191).

The statements made in those letters therefore have the status of uncontested facts.

They show that Bent and Wilkinson were in occupation of the island at and prior to its becoming a part of the Hawaiian Kingdom in 1862.

(g) Immediately before the commencement of this action to quiet the title, the government of the United States, acting through officers of the navy, had been negotiating with these petitioners for a lease of two of the islets of Palmyra (R. 222, 228, 256, 281).

The fact that the plaintiff below, although it had the burden of proof, was unable to produce a particle of evidence to indicate that any of the several Hawaiian governments at any time asserted title or made any claim to Palmyra as public land, can be reconciled only with the proposition that the government recognized the private ownership of the island. That being so, title thereto could not have passed to the United States by the joint resolution of 1898 by which only public property was acquired from the Republic of Hawaii. Private titles were not affected.

It is the intention of the parties that is important. By the terms of the joint resolution there was ceded to the United States "sovereignty" over the Hawaiian Islands and their dependencies, and the "ownership" of all public, government or crown lands.

The Republic of Hawaii never claimed that Palmyra was public or crown land, nor was the island inventoried as public property when the United States assumed control.

Inasmuch as this question of title was never dreamed of until invoked by the exigencies of this case, it is abun

dantly evident that the island of Palmyra was not a factor in the annexation of the Hawaiian Islands in 1898.

II.

THE COURT ERRED IN HOLDING THAT THE CONTRACT BETWEEN THE HAWAIIAN GOVERNMENT AND E. P. ADAMS, DATED MAY 31, 1858 (R. 93), FORMED PART OF THE "RESOLUTION REGARDING THE ISLAND CORNWALLIS" REFERRED TO IN EXHIBIT C (R. 64).

The record shows in this connection that on May 24, 1858, one E. K. (should be E. P.) Adams wrote the Hawaiian minister of the interior stating that he had information of an island or islands in the North Pacific on which there were large deposits of guano and desired to take possession of the same in the name of the Hawaiian government, provided the government would grant him seven-eighths of the islands and give him the exclusive right to conduct all business connected therewith (R. 90).

It does not appear that the letter was replied to, but on May 31, 1858, an agreement was entered into between Adams and the minister of the interior whereby Adams was granted the exclusive right for five years to take guano or any other produce which may be found on any island or islands in the North Pacific ocean taken possession of, in the name of the King by Samuel Clesson Allen, Adams to pay to the government one-eighth of the profits of the enterprise (R. 93).

On the same date a commission was issued to Samuel Clesson Allen by the King, authorizing him to take possession of any island or islands in the North Pacific "which

are not in the possession of any other government or any other people" (R. 168).

Under date of July 12, 1858, Allen reported that he had visited and taken possession of two islands as directed by his commission, namely, Cornwallis Island and Kalama Island (R. 171).

At a meeting of the King's privy council held on July 27, 1858, a resolution was passed as follows:

> "Resolved that Cornwallis Island * * * and Kalama Island * * * having been taken possession of, with the usual formalities, on the 14th and 19th of June 1858, by Samuel C. Allen Esquire, in the name of Kamehameha IV, the said islands are to be considered as part of His Majesty's Domain."

It subsequently appeared that the Cornwallis Islands were discovered on January 8, 1858, by one Parker on the American Schooner Palestine, and possession was taken in the name of the United States and the American flag was raised.

The attorney general held (9 Op. A. G. 364) that the islands had become American property pursuant to the provisions of the Guano Islands Act of 1856 (U.S.C.A. Title 48, Secs. 1411, 1419). Allen's expedition was described as "a sharp scheme of Americans under cover of the Sandwich Islands sovereignty."

On October 16, 1858, the minister of the interior addressed a letter to E. P. Adams expressing regret at the unauthorized action of Mr. Allen and declared the agreement of May 31, 1858, to be "void" (R. 154).

The Hawaiian government abandoned its claim to Cornwallis (R. 101, 178, 217).

The majority of the court below took the view that the agreement made with Adams on May 31, 1858, and declared to be void on October 16 following, was part of the resolution regarding the Island Cornwallis within the meaning of the minutes of the cabinet council of February 26, 1862, when authorizing the annexation of Palmyra Island.

We contend that that view is untenable. The agreement with Adams assumed that the annexation of Cornwallis would be accomplished, but it formed no part of the annexation of the island which was expected to be made pursuant to the commission issued to Allen. What, if any, connection there was between Adams and Allen does not appear.

There is no evidence that Bent or Wilkinson had any knowledge that Adams had had an agreement with the government concerning the use of Cornwallis, and no presumption to that effect can be indulged. The minutes of the meeting of February 26, 1862, made no reference to any such agreement.

The expression used in the minutes with reference to the annexation of Palmyra Island, was that the minister of the interior was directed to "grant what the petitioners apply for, following the precedent of the resolution regarding the Island Cornwallis and without exceeding the same" (R. 64). The resolution regarding Cornwallis was a simple one. It merely declared that the islands "be considered part of His Majesty's domain," that is to say, that Hawaiian sovereignty be extended there. The phrase "without exceeding the same" could not have referred to the agreement with Adams which was no part of the reso-

lution. It is possible that another resolution regarding Cornwallis had been adopted but, if so, there is no evidence of it. There certainly is no room for any presumption or inference that an agreement was entered into by the government and Bent & Wilkinson concerning the use of the Island Palmyra. The whole tone of Bent's report (R. 74, 75) negatives the existence of such an agreement. The same may be said of the letter of the minister of the interior (R. 69).

The Hawaiian government was so chagrined with the outcome of the attempted annexation of Cornwallis that they doubtless would have liked to forget about it. What the government did remember was that their emissary, Allen, had deliberately removed the American flag, and had proceeded to annex the islands as though no one had previously been there. So, in issuing the commission to Bent, the government changed the phraseology to fit the occasion, using the words "not having been taken possession of" instead of "not in the possession of," as in Allen's commission. The King in council in 1862 wanted to make sure that Bent's commission would not result in another fiasco; hence it was decided that the resolution regarding Cornwallis should not be exceeded.

Taking Exhibit C (R. 63) and Exhibit N (R. 107) together, the reasonable interpretation would be that Palmyra would be annexed and declared to be part of His Majesty's domain if the island had not previously been taken possession of by any other government or people. The government did not want to be dragged into another controversy.

The evidence above referred to was introduced at the trial by the plaintiff in the endeavor to support the allegation contained in paragraph II of the petition (R. 3) to the effect that in 1862, Bent & Wilkinson had been granted the right to take guano and other produce from Palmyra for the period of five years.

It is our contention that the fact that an agreement to that effect had been made in 1858 with reference to the Island Cornwallis, is not evidence that such an agreement had been made with Bent & Wilkinson in 1862 with reference to the Island Palmyra, and that the allegation was not sustained by any proof.

III.

THE COURT ERRED IN NOT HOLDING THAT THE EVIDENCE WARRANTED A FINDING THAT THE TITLE TO THE ISLAND HAD PASSED FROM THE HAWAIIAN GOVERNMENT BY A LOST GRANT.

In the event that it should be held that the island, upon its annexation in 1862, became public land, it would be necessary to determine whether the government of Hawaii had subsequently parted with its title (R. 13).

The court below held that there was no proof of such alienation, and that the evidence did not show possession on the part of petitioners and their predecessors which would meet the requirements concerning lost grants.

It is true that owing to the lapse of years and the deaths of all of petitioners' predecessors in title, proof that actual possession had been maintained by them was not directly shown.

The registration of the fee simple title to the island by H. E. Cooper in 1912 implied that he was in possession, and there was some evidence of possession by petitioners, (R. 252), but counsel for the plaintiff objected to evidence of that description and agreed that what Mr. Fullard-Leo did with or about the island was irrelevant as to the question of title (R. 253, 254). That the petitioners were in possession was not controverted.

In considering the subject of the possession of land, regard must be had of its nature and situation. Possession of a small distant island is very different from possession of a parcel of land in a city, or even of agricultural or grazing land in a settled community. Continued physical occupation would not be expected and ought not to be required. Each case must depend on its own circumstances.

The taxation of the land as private property is a potent circumstance, since it cannot be assumed that the government would collect taxes on its own land, nor that an individual would pay taxes on land which he did not claim to own. *Jover y Costas v. Philippine Islands,* 221 U. S. 623, 633; *Roberts v. Northern Pacific Ry. Co.,* 158 U. S. 1; *State v. Carr,* 191 Fed. 257, 270; *Re Title of Kioloku,* 25 Haw. 357, 364, affirmed in *Territory v. Hutchinson Sugar Plantation Co.,* 272 Fed. 856.

If, upon the annexation of Palmyra in 1862, title to the island vested in the government as public land, it was subject to sale and conveyance, and the subsequent acquiescence by the governments of Hawaii in the private ownership, and the levy of taxes, creates and is entirely consistent with the possibility that a conveyance was made to Bent & Wilkinson though none such can now be found.

Such circumstances justify all reasonable presumptions in support of the claim of title. *Carino v. Philippine Islands,* 212 U. S. 449, 460.

It was shown that in the years 1885, 1886 and 1887, the government assessed the island and collected taxes from its then owner. The succeeding owners having died and the old tax records being incomplete through loss (R. 312), further proof of the payment of taxes could not be made, but it is a reasonable presumption that the taxes were assessed against and paid by the several successive owners.

We believe that there is no difference in principle between this case and the *Carino* and *Kioloku* cases since in each there was a direct chain of private title but no evidence of an original grant from the government. Here, as in the *Carino* case "as far back as testimony and memory goes, the land has been held by individuals under a claim of private ownership."

Assuming, for the sake of argument only, that in 1862 Palmyra was public land, the events of the many years which have elapsed can be logically accounted for only by the presumption that the government had parted with its title.

IV.

THE COURT ERRED IN NOT HOLDING THAT THE JUDGMENT OF THE LAND COURT OF HAWAII ESTABLISHED FEE SIMPLE TITLE TO THE ISLAND IN HENRY E. COOPER, PETITIONERS' GRANTOR.

As pointed out in the dissenting opinion below, the bearing on this case of the judgment of the Land Court of

Hawaii whereby the fee simple title to Palmyra was adjudged to be in H. E. Cooper was not given sufficient attention.

The plaintiff had alleged that the Land Court proceeded without jurisdiction (R. 4) and prayed that its decree be declared invalid and held for naught (R. 6).

A copy of the proceedings in the Land Court was admitted in evidence at the trial of this case (R. 136, 138, 145, 150) but was not printed in the record. The exhibits were sent to the Court of Appeals (R. 56, 345).

The Territory had been made a party, and it filed a disclaimer of interest (R. 146). The United States of course was not made a party, but it could have intervened. Land Title, *Kalena,* 34 Haw. 93.

The Land Court exercises a very broad jurisdiction, and may adjudicate equitable as well as legal rights (Rev. Laws Hawaii 1935, Sec. 5037 [4]).

Section 91 of the Hawaiian Organic Act (U.S.C.A. Title 48, Sec. 511) provides that the public property ceded to the United States by the Republic of Hawaii "shall be and remain in the possession, use and control of the government of the Territory and shall be maintained, managed and cared for by it at its own expense until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii," and may be restored to its previous status by direction of the President, "and the title to any property so transferred to the Territory may thereafter be transferred" to any political subdivision by the governor.

By paragraph (1) of section 72, the Territory may sell public land and give good title to the purchaser (U.S.C.A., Title 48, Sec. 673). The Territory may lease public land and use the rent for its own purposes.

The Territory may, and, as shown by the *Kioloku* case, *supra,* does take advantage of the statute to register title to public land in its own name.

In short, the Territory, unless or until the land be taken for federal purposes, and subject to certain restrictions not material here, may deal with the land as the owner thereof.

That, evidently, would authorize the Territory to file a disclaimer of interest in a proceeding in the Land Court when it has been made a party, and in fact claims no interest, as was done in the proceeding to register the title to Palmyra in 1912. It would be an exercise of the power and authority given to the Territory by the Organic Act. We think that the very least that could be said is that the Territory is the authorized agent of the United States as to all matters concerning the management of the public lands in Hawaii, including authority to take proper steps in Land Court proceedings, as was done in Land Title, *Kalena, supra,* where the land in dispute had previously been taken over by the federal government in conformity with the above quoted provisions of section 91 of the Organic Act.

If, after a land title has been registered and has changed hands in reliance on the certificate of the Land Court, as was done with respect to Palmyra, the federal government can repudiate the disclaimer of the Territory, the Torrens system of Hawaii is not what it is generally supposed to be.

It would certainly seem that the petitioners are, at least, entitled to protection as *bona fide* purchasers.

A subordinate phase of the *Palmyra* case went to the Supreme Court of Hawaii. *In re Title to Palmyra Island,* 21 Haw. 431. Thereafter further proceedings were had in the Land Court and a final decision was rendered, with the result already stated.

The majority opinion below referred to that fact but, as pointed out in the dissenting opinion, it attached no importance to it. We believe that was error.

In *John Ii Estate v. Brown,* 235 U. S. 342, a proceeding commenced in the federal court, this Court had before it a somewhat similar situation, and reversed the judgment of the Court of Appeals because it had not accepted the law on a local question as it had been laid down by the Supreme Court of Hawaii in another proceeding. This Court expressed surprise (p. 349) that the court below had not followed the decision of "the court on the spot" (p. 346).

The application to this case of the rule applied in that case would require a holding to the effect that the title to the island had been settled in the proceeding in the Land Court.

CONCLUSION

The first question hereinabove discussed is one as to which we believe there is no judicial precedent, and has been decided by the court below upon a misapplication of the law concerning title by discovery. The second and third questions, we contend, were erroneously decided for the reasons mentioned. The fourth question has inferen-

tially been decided adversely to these petitioners without adequate consideration by the court below, and in a manner not consonant with views heretofore expressed by this Court.

We submit that this Court, in the exercise of its supervisory jurisdiction, should grant certiorari in this case, and, upon hearing of the cause, reverse the judgment of the Court of Appeals and reinstate that of the District Court.

DATED: Honolulu, Hawaii, March 18, 1943.

Respectfully submitted,

A. G. M. ROBERTSON,
Counsel for Petitioners.

ROBERTSON & CASTLE,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 883

LESLIE FULLARD-LEO AND ELLEN FULLARD-LEO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 348–377) is reported in 133 F. (2d) 743.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered February 1, 1943 (R. 377–378). The petition for a writ of certiorari was filed April 3, 1943. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether title to Palmyra Island was granted to Zenas Bent and Johnson Wilkinson when the island was annexed by the Kingdom of Hawaii in 1862.

2. Whether the presumption of a lost grant may be indulged where there has been only spasmodic possession at long intervals and where the original grant in a complete chain discloses the defect in the claimed title.

3. Whether proceedings to register title in the Land Court of Hawaii, to which the United States was not a party, deprived the United States of its title to Palmyra Island.

STATEMENT

The judgment sought to be reviewed (R. 377–378) reversed a judgment of the district court (R. 51–52) dismissing the Government's petition in a suit brought to quiet title to Palmyra Island. The material facts, as shown by documentary evidence, may be summarized as follows:

Palmyra Island is the name given to a group of about fifty uninhabited coral islets situated about 900 miles south of Honolulu (R. 28). The island was discovered and named by Captain Sawle of the American ship *Palmyra* in 1802 (R. 199). It was visited by Dr. G. P. Judd, of the American Guano Company, in 1859 and claimed by him as a guano island (R. 248, 162, 160–161). But it

was not annexed by any nation until 1862 (R. 28). In that year Palmyra Island was the subject of a petition submitted to King Kamehameha IV of the Hawaiian Islands by Zenas Bent and Johnson Wilkinson, naturalized Hawaiians (R. 28, 80–82). The petition has been lost, but its substance appears from the minutes of a meeting of the King and his Cabinet Council on February 26, 1862, at which meeting the following action was taken (R. 29, 64):

> P. Kamehameha read a Representation from Z Bent & Mr. Wilkinson, about the Island Palmyra, requesting that the Island should be considered a Hawaiian possession & be placed under the Hawaiian Flag
>
> After some discussion it pleased the King to direct the Minister of the Interior, to grant what the Petitioners apply for, *following the precedent of the Resolution regarding the Island Cornwallis & without exceeding the same.*[1]

The precedent regarding Cornwallis Island (also known as Johnson's Island) had been established four years earlier by the following events: On May 24, 1858, E. P. Adams asked authority to take possession of certain guano islands he believed to exist in the North Pacific "providing that the Government [of Hawaii] will grant to him seven eights of said island or islands (reserving to themselves one eighth)" (R. 41, 90). The request was refused. Instead, Adams was given,

[1] Italics are supplied throughout this brief.

by a contract dated May 31, 1858, a five-year exclusive right to take guano from any islands which might be found by his navigator Samuel C. Allen, captain of the schooner *Kalama* (R. 40, 93–96). On that same day a commission was issued authorizing Allen to take possession of such discoveries in the King's name (R. 40, 168–169). On June 14, 1858, Allen took possession of Cornwallis Island with the usual formalities, and in July of 1858 submitted a report of his expedition to the Minister of Interior, Prince Lot Kamehameha (R. 40, 41, 171–173). The Privy Council thereupon resolved that Cornwallis Island was "to be considered as part of His Majesty's Domain" (R. 107–108).[2]

The Council having approved the expedition to Palmyra following and without exceeding the Cornwallis precedent, the Minister of Interior authorized Bent to take possession of Palmyra, enclosing a commission (R. 31) in the same form as that used by Allen four years before (R. 69–71, 168–169). On April 15, 1862, Bent visited Palmyra, took possession according to his di-

[2] This attempted annexation failed because no one was left in possession of the island, with the result that a month after Allen's visit possession was taken and maintained on behalf of the United States. 9 Op. A. G. 364. On Allen's arrival at the island he had destroyed evidences which he found there of prior claims on behalf of the United States, but he did not advise of this in his report to the King. On subsequently learning of this, Prince Kamehameha declared the Adams contract void (R. 40, 42, 154–157).

rections, and left five men on the island (R. 32–33, 74–75). These acts having been reported to the Minister of Interior (R. 32–33, 74–75), annexation was formally proclaimed by him on June 18, 1862 (R. 34, 83):

> Whereas, on the 15th day of April, 1862, Palmyra Island, in latitude 5° 50′ North, and longitude 161° 53′ West, *was taken possession of,* with the usual formalities, by Captain Zenas Bent, he being duly authorized to do so, *in the name of Kamehameha IV.,* King of the Hawaiian Islands. Therefore, This is to give notice, that the said island, so taken possession of, is henceforth to be considered and respected *as part of the Domain of the King* of the Hawaiian Islands.

In December of that year Bent sold to Wilkinson his interest in their partnership and "All my right, title and interest in and to *all the property* of whatever description now lying or situated *on* Palmyra Island in the Pacific Ocean which island by proclamation of His Majesty Kamehameha IV at present *belongs* to the Hawaiian Kingdom" (R. 35–36, 122). In 1866 Wilkinson executed a will leaving his rights in Palmyra to his wife Kalama (R. 36, 127).

On June 15, 1885, two of Kalama's heirs deeded Palmyra to W. L. Wilcox who soon conveyed it to the Pacific Navigation Company by deed recorded August 27, 1885 (R. 37; United

States Exhibits Q, R, original). On that day the deed from Bent to Wilkinson was recorded, having been acknowledged a month earlier by a person familiar with Bent's handwriting (R. 123).

In 1898 Palmyra was annexed by the United States as one of the Hawaiian group (R. 133–134). Under that transfer, the fee title to all public lands of the Hawaiian Government was conveyed to the United States, it being subsequently provided that such lands should be administered by the Territorial Government until Congress otherwise directed. 48 U. S. C. sec. 511. In 1905 the Attorney General of Hawaii reported to the Governor of the Territory upon certain islands, including Palmyra, advising him in part as follows: "I believe that from these records the government's right to lease the islands, or any privileges thereon, is clear" (R. 297–299).

In 1912 Henry E. Cooper, the successor in interest of Wilkinson, instituted proceedings to obtain a guaranteed title pursuant to the Torrens system in force in the Territory. The examiner reported unfavorably on the ground that the petitioner had failed to show a conveyance from the Government.[3] After a trial the Land Court

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[3] For the convenience of the Court the relevant portions of the examiner's report which appears in United States Exhibit CC, original, are set out in the appendix, *infra*, pp. 20–21.

granted registration (R. 4, 16), the Territory having filed a disclaimer (R. 374). The court assumed without discussion that Wilkinson possessed a fee title in 1866. At about the same time that he instituted these proceedings, Cooper asked Governor Frear to have a United States vessel proceed to the island and confirm the claim of American sovereignty (R. 199–204), and Governor Frear sent the request to Washington (R. 194–197).

Congress having authorized the construction of naval aviation facilities on Palmyra by the Act of April 25, 1939, c. 87, 53 Stat. 590, the present suit to quiet title to the island was accordingly instituted, the complaint alleging that the island had been annexed by the Kingdom of Hawaii in 1862, that title thereto had never been granted to anyone, and that the United States acquired ownership of the island in 1898 (R. 2–6).[4] Appellees' answers admitted annexation of Palmyra in 1862 by Hawaii but denied that ownership was transferred to the United States and alleged that they had title (R. 9–26).

After examining the documentary evidence introduced by the parties, the district court filed findings of fact and conclusions of law[5] and en-

[4] Whatever rights Bent and Wilkinson had were transferred by mesne conveyances to Cooper, who in 1922 transferred his rights in all except two of the islets to the Fullard-Leos (R. 129–130).

[5] The findings included the district court's opinion. The facts were first summarized (R. 28–39) and then the court

tered judgment dismissing the action (R. 28–52). The circuit court of appeals reversed, holding that the Hawaiian Kingdom acquired title in 1862 and that such title was ceded to the United States in 1898 (R. 357–360).

ARGUMENT

This case is, in petitioners' words (Pet. 5), *sui generis*. Thus it presents no conflict of decisions and moreover is correct.

1. Petitioners assert that Bent and Wilkinson occupied Palmyra Island "in the late 1850's," some years before its annexation[6] by Hawaii in 1862 (Pet. 2, 5–6, 10, 12–13), and that under international law their private rights must be respected by the annexing sovereign (Pet. 12). Assuming the facts to be as petitioners assert, nevertheless the principle that private title will be respected when territory is transferred from one sovereign to another has no application here. Although the existence of Palmyra Island was known as early as 1802 it was not occupied by any established

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reviewed the contentions and stated its opinion as to the principles of law involved (R. 39–50).

[6] The only evidence of this is a passing reference in Cooper's letter of 1912 to Governor Frear (R. 199). On the other hand, G. P. Judd, an American guano merchant, visited Palmyra in October 1859, found no evidence of occupation, claimed the island for the United States, and left (R. 159–161, 248).

government until its annexation by Hawaii in 1862. Prior to such annexation it was *res nullius.* "All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation." Lawrence, *Principles of International Law* (7th ed. 1923) p. 148.

When Bent and Wilkinson, two naturalized Hawaiians, took possession of the island in the name of King Kamehameha IV in 1862, under established principles of international law title vested in the Government of Hawaii. *Johnson* v. *McIntosh,* 8 Wheat. 543 (1823); *Martin* v. *Waddell,* 16 Pet. 367 (1842); *American Guano Company* v. *United States Guano Co.,* 44 Barb. 23 (N. Y. 1865); 3 Washburn, *Real Property* (6th ed. 1902) sec. 2000, p. 166; 1 Moore, *International Law Digest* (1906) pp. 258–268; 9 Op. A. G. 364 (1859); Lawrence, *Principles of International Law* (7th ed. 1923) p. 148. Thus, in *Martin* v. *Waddell, supra,* the Court said (pp. 409–410):

> * * * if the discovery be made and possession taken under authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled, that the discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the na-

> tional domains; by that organ, in which all territory is vested by law.[7] * * *

Whether individuals who have been in possession of land thus annexed (assuming Bent and Wilkinson to have been in possession) will be accorded any rights is a matter for the occupying Government to decide (cf. Pet. 12). Thus, the Indians in the Western Hemisphere retained only such legal rights as the particular sovereign—England, France, or Spain, gave or recognized. Title having vested in the Government of Hawaii in 1862 it remained there unless subsequently conveyed away. As petitioners claim title through Bent and Wilkinson, they must show a subsequent grant from that Government of the fee simple title to Bent and Wilkinson.

The documents relied upon by petitioners do not constitute the necessary grant. Rather than establishing a grant to Bent and Wilkinson the proclamation of annexation (R. 83) and other evidence affirmatively shows that the King was

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[7] "Discovery" under this rule does not, as petitioners assume (Pet. 11), mean the first disclosure of existence of the land, but rather it refers to the first occupation by an established government. Thus, although the existence of the North American continent was made known in 1498, or earlier, title by "discovery" was created when the various localities were thereafter occupied by England, France, Spain, and Holland. See *Johnson* v. *McIntosh*, supra, at p. 574, where reference is made to the acquisition of sovereignty by the nations over areas of North America based on "discovery"; these "discoveries" were long after Cabot and Vespucci discovered the North American continent.

retaining a fee simple title for the Hawaiian Government. Bent, as agent of the King, was authorized to take possession of Palmyra in the name of the King (R. 71–72). This was done (R. 74) and the island was proclaimed "as part of the Domain of the King of the Hawaiian Islands" (R. 83). "Domain" means land owned by a sovereign; for example, "public domain" means lands owned by the United States. *Barker* v. *Harvey,* 181 U. S. 481, 490; *People* v. *Shearer,* 30 Cal. 645 (1866); Black, *Law Dictionary* (3rd ed. 1933, pp. 606–607); Webster's *New International Dictionary* (2nd ed., p. 768). Evidently the Americans who carried the English language with them to Hawaii caused the Hawaiians to use "domain" in the same sense. In the Act of June 7, 1848 (Hawaii Civil Code (1859), pp. 374–375), when, in connection with abolition of feudal tenures, the King gave to the nation "the greater portion of his Royal Domain," the words "royal domain" obviously meant the royal lands.[8] Any doubt as to the meaning of "domain" standing alone (see R. 366) disappears when reference is made to the "precedent of the Resolution regarding the Island Cornwallis." In that case, the King had refused to grant a fee simple in seven eighths of the island and instead had given a five-year con-

[8] Hawaii at this time generally followed English and American law and the English version of the 1859 Code was controlling. Hawaii Civil Code (1859), sec. 1493. See *Territory* v. *Liliuokalani*, 14 Hawaii 88, 101.

tract right to extract guano. The resolution of the Privy Council made this refusal effective by declaring that the island was "to be considered part of His Majesty's Domain" (R. 107–108). The specific reference to the Cornwallis precedent and the use of the same language in the annexing resolution show that the King intended to retain for Hawaii the fee simple title to Palmyra Island.

Hawaii possessed, at the time, an established system of recording conveyances (Hawaii Civil Code, 1859, secs. 1249–1265) and the Minister of Interior who managed the government lands was authorized to sell them, a Royal patent being issued to the purchaser (Hawaii Civil Code, 1859, secs. 39–48). Neither Bent nor Wilkinson ever received such a patent.

Petitioners contend, nevertheless, that Bent and Wilkinson did have title. The argument is divided into two parts. First, petitioners assert that a pre-existing "title by occupancy" was recognized by the King in 1862 (Pet. 10–15). Then they explain (Pet. 23) the condition "following the precedent of the Resolution regarding the Island Cornwallis without exceeding the same" to mean that the king agreed to annex Palmyra "if the island had not previously been taken possession of by any other government or people." The arguments lack factual foundation. Bent's report, after taking possession in the name of the

Hawaiian king, and upon which the proclamation annexing Palmyra was based, did not state whether the island was inhabited or whether there was any evidence of prior occupation (R. 74–75). Clearly, if concern over prior possession by others was what caused the insistence on observance of the Cornwallis condition, the King would not have proclaimed annexation upon the basis of a report which was silent as to such possession. Nor is there any evidence to indicate that the King was recognizing a title by occupancy. Such alleged possession is not referred to in any of the proceedings of annexation (R. 64, 69–71, 74–75, 83). In fact, there was no prior occupation by Bent and Wilkinson. In 1859, Dr. Judd took possession for the American Guano Company and bonded the island under the Guano Act of 1856 (R. 248–250, 162, 159–160, 283–284).[9] Contemporary accounts state that, in 1862, Bent took possession of Palmyra, "an uninhabited spot" (R. 247). And Bent's report of annexation, stating that after taking possession in the name of the King he had planted vegetables, erected a dwelling house and left five men on the Island (R. 74–75), was not written by a person who had been occupying the island for several years. In fact, Wilkinson bought the Sloop *Louisa* in February 1862 in order to annex

[9] This visit failed to constitute annexation because possession was not maintained, 9 Op. A. G. 364 (1859).

Palmyra (R. 68). Petitioners' assertion of prior occupancy is based entirely on the statement contained in Henry E. Cooper's letter in 1912 (Pet. 18–19). Cooper had, a short time before, purchased the island and three months later instituted the Land Court proceedings (R. 199–204). He had no personal knowledge of an event occurring twenty-eight years before the year (1890) when he came to Hawaii (Preston, *American Biographies* (1940)) and the statement is contradicted by the contemporary newspaper accounts which he furnished the Governor at the same time (R. 247–250).[10]

Finally, it does not appear that either Bent or Wilkinson claimed to own the island. In December 1862, their partnership was dissolved and Bent assigned to Wilkinson his right, title, and interest to property "now lying or situated *on* Palmyra Island" which "at present belongs to the Hawaiian Kingdom" (R. 122). This is not the language which would be used by an absolute owner of the island. Instead it is the very language which would be used by one claiming merely

[10] Further doubt is cast upon this self-serving statement by the fact that the letter enclosed a copy of the minutes of the Cabinet Council meeting from which the chain of title originated, but that copy omitted the limitation "following the precedent of the Resolution regarding the Island of Cornwallis & without exceeding the same" (R. 240–241). Cooper apparently inspected the minutes for he borrowed the file on Palmyra from the Territorial Archives in June 1911 and returned it in December of that year (R. 77).

a five-year right to remove guano from the island. Moreover, this assignment was not acknowledged as a deed and recorded until 1885, after the death of both Bent and Wilkinson (R. 123). When Wilkinson made his will in 1866, he did not devise the island as an absolute owner would. Rather, his will indicates that he bequeathed a leasehold estate in the island (R. 127).

It is evident, therefore, that the decision of the court below holding that the Hawaiian Kingdom did not grant fee simple title to Bent and Wilkinson in 1862 was correct.

2. Being unable to establish a grant of Palmyra, petitioners bring forth the common law presumption of a lost grant. This presumption cannot apply here, for there is no gap in the chain of the alleged title which that grant might supply. The chain of title from Bent's assignment, which specifically refers to the proclamation of annexation (R. 122), to the petitioners is complete. The presumption is not a rule of law but a factual inference which is subject to rebuttal (*In re Title of Kioloku,* 25 Hawaii 357), and here it is rebutted by the known fact that the original grantee from whom title is claimed had only a five year *profit a prendre,* not a title in fee simple. The presumption cannot be used to cure a defect in one of the deeds composing a complete chain of title. *Houston Oil Co.* v. *McCarthy,* 245 S. W. 651 (Tex., 1922); *Dolbear* v. *Gulf Production Co.,*

268 Fed. 737 (C. C. A. 5), certiorari denied, 255 U. S. 569; *Dessaunier* v. *Murphy,* 27 Mo. 48 (1858); *Colvin* v. *Warford, et al., Lessee,* 20 Md. 357 (1863).[11]

Moreover, as the court below held (R. 360), the adverse, exclusive, and interrupted possession, upon which the presumption is based (*United States* v. *Chavez,* 175 U. S. 509, 522), is not present here. A few months after annexation Bent assigned his rights to Wilkinson. It does not appear that Wilkinson ever occupied the island, and in 1866 he executed his will in New Zealand (R. 125), calling himself a "settler" there (R. 126), and naming as executors two residents of New Zealand, one of whom was his brother (R. 126). The Pacific Navigation Company paid taxes only for the years 1885, 1886, and 1887.[12] The Land Court stated that the Company placed a man on the island for about a year at this time "since which date no living soul

[11] *Carino* v. *Insular Government,* 212 U. S. 449 (Pet. 26) is irrelevant, for in the absence of any original grant the court merely inferred the first conveyance from the Government as to land which had been long occupied and cultivated. Moreover, the decision is based in part on the fact that under the Spanish law prescription operated to bar the Philippine sovereign, which is not the Hawaiian law. *Thurston* v. *Bishop,* 7 Hawaii 421, 437.

[12] Contrary to petitioners' assertion (Pet. 25), this payment was not a government recognition of a private title, for, as the tax officials testified, the taxpayer itself placed the lands on the rolls (R. 307) and in many cases taxes have been paid on public lands (R. 308).

has resided thereon" (page 7 of exhibit 28 attached to U. S. Ex. CC original).[13] And during the eighteen years petitioners have claimed ownership, they have spent only thirteen days on the island (R. 276–277). Finally, the fact that in 1912 Cooper sought the assistance of the Government to prevent Great Britain from taking possession indicates that the island was uninhabited during all of this period except for the occasional attempts to produce something of value from it, since actual occupation of the island by Cooper would alone have been sufficient to cause Great Britain to recognize American sovereignty over it.

3. Petitioners assert (Pet. 26–29) that the United States is bound by the Land Court decision registering title under the Torrens system. The Land Court examiner fully investigated the source of the alleged title and, as one ground of his report against registration, stated that no showing was made that the island was private property. The Land Court gave no reason for overruling this report, so it is not possible to tell what the basis was for the decision registering the title.

The United States has not waived its immunity from suit, and hence it could not be joined in the

[13] See also page 6 of Exhibit 23 attached to U. S. Exhibit CC original, in which an Hawaiian newspaper in 1897 stated that the island was annexed by the British in 1889 "finding the place without any inhabitants."

registration proceedings. It follows that it was not bound by those proceedings. Cf. *United States* v. *U. S. Fidelity Co.*, 309 U. S. 506, 514–515. Despite the contrary intimation of the petition (Pet. 28) and of the dissenting judge below (R. 374–376), the territorial courts have recognized that the title registration does not bind the United States. *Land Title, Kalena,* 34 Hawaii 93.[14] Petitioners' counsel, a leading member of the Hawaiian bar of long experience, admitted at the trial that the United States "has never—at any rate, so far as I know—given consent to be sued in the Territorial Land Court * * *" (R. 137; see also R. 121). No contrary contention was advanced in the circuit court of appeals. Thus, petitioners may not now urge that the United States is bound by the Land Court judgment. The decision below will not upset registered titles in Hawaii. In those few instances in which the United States subsequently establishes paramount title the purchaser of the Torrens certificate will be reimbursed from the registration assurance fund. Revised Laws Hawaii (1905), sec. 2489.

[14] The Territory does not have title but merely possession of public lands. Section 91 of Organic Act of April 30, 1900, c. 339, 31 Stat. 159, 48 U. S. C., sec. 511. Its disclaimer merely waived its right to possession. The lands to which the Territory may obtain title (Pet. 27) are limited to public utilities and lands used for similar public purposes.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1943.

APPENDIX

The relevant portions of the report of the examiner in the Land Court proceedings appearing on sheets 33–35 of United States Exhibit for Identification 23, United States Exhibit CC original, are as follows:

> From this investigation I am of the opinion that the title is not shown by any record to be in the petitioner.
>
> The Court of Land Registration undertakes to insure title to the premises for the Territory of Hawaii.
>
> If the Territory of Hawaii, as shown by its own claims, includes the Island of Palmyra (or more properly a group of islands by that name, in this report) I have no further concern.
>
> The Territory of Hawaii has called my attention to data relating to the subject of the claim by the United States, which is not the subject of any investigation or subject to be passed upon by this report, except as preliminary to taking up the subject of the title.
>
> Second. The title of petitioner is not shown of record because no conveyance has ever been made from the Government.
>
> Therefore, this tract is part of the public land subject to the control of the Commisioners of Public Lands.
>
> Third. Assuming that Z. Bent in 1862 had title to convey, the petitioner has not shown that he owns the whole interest as claimed.

P. 3 *of report* (Sheet 35):

> Taking up the discussion more in detail:
>
> First. I assume the jurisdiction of the Court, as one not open to investigation except in the peculiar relation of the Territory of Hawaii as an insurer of title of the holder of a certificate of title. The political department of the Government sets forth the bounds of the Territory and the Court will not go into that, further than to know that the political department has declared that the premises are within the bounds of the Territory of Hawaii.
>
> Second. The fee simple title belongs to the Territory of Hawaii unless the petitioner can show some conveyance from the Government. His abstract shows no such conveyance.
>
> In 1862 the Civil Code of 1859 provides, sec. 42, that the Minister of the Interior, etc., should have power to sell public lands, and a Royal Patent signed by the King was to issue to the purchaser in fee simple for any Government land conveyed (sec. 43). A faithful record of these conveyances was required to be kept (sec. 44).
>
> No such record appears (Note Sheet 11).
>
> Therefore, there is no showing that the island is private property.
>
> * * * * *

Report concludes (p. 5):

> I base my report upon the failure to show title from the Government, and upon the failure to prove any fee simple title to the whole premises. An undivided interest is not capable of registration. Also, the lack of description at present prevents the matter being finally considered until one is furnished.

Respectfully submitted.

P. L. WEAVER, *Examiner.*

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